STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 1999
v	No. 208669 Berrien Circuit Court
BERNARDINO TAMAYO, Defendant-Appellant.	LC No. 97-406142 FC

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted of five separate counts, after a two-day jury trial: (1) conspiracy to possess with intent to deliver between 5 and 45 kilograms of marijuana, MCL 750.157a; MSA 28.354(1); (2) possession with intent to deliver between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii); MSA 14.15(7401)(2)(d)(ii); (3) conspiracy to possess with intent to deliver between 50 and 225 grams of cocaine, MCL 750.157a; MSA 28.354(1); (4) possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); and (5) carrying a concealed weapon, MCL 750.227(1); MSA 28.424(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12(1); MSA 28.1084(1). Defendant appeals by right from his conviction on the two conspiracy counts and also appeals his sentences. We affirm defendant's convictions but remand to the circuit court for clarification and correction of the judgment of sentence.

I.

Defendant challenges the sufficiency of the evidence on two counts, conspiracy to possess with intent to deliver between 5 and 45 kilograms of marijuana and conspiracy to possess with intent to deliver between 50 and 225 grams of cocaine, MCL 750.157a; MSA 28.354(1). That statute provides: "Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy." The predicate substantive offenses which defendant conspired to commit are prohibited by MCL 333.7401; MSA 14.15(7401).

In *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997), our Supreme Court explained the elements necessary to prove a conspiracy involving the underlying offense of possession with intent to deliver drugs:

> To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person.

Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime, including intent. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Moreover, direct proof of the conspiracy is not required; proof of the conspiracy may be derived from the circumstances, acts, and conduct of the parties. *Justice, supra* at 347. After viewing the evidence in the light most favorable to plaintiff, *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), we conclude that a rational jury could have been convinced, beyond a reasonable doubt, that (1) defendant possessed the specific intent to deliver between 5 and 45 kilograms of marijuana and between 50 and 225 grams of cocaine, (2) Quesada possessed the specific intent to deliver between 5 and 45 kilograms of marijuana and between 50 and 225 grams of cocaine, and (3) defendant and Quesada possessed the intent to combine with each other to deliver between 5 and 45 kilograms of marijuana and between 50 and 225 grams of cocaine to Port Huron for profit.

First, sufficient evidence was presented to convince a reasonable jury that defendant possessed the requisite specific intent. The parties stipulated to the admission of a forensics report which indicated that 55.9 pounds of marijuana and 130.199 grams of cocaine were seized from the car which defendant was driving. Plaintiff then presented the testimony of Lieutenant McAndrew, a supervisor with the Michigan State Police Narcotics Task Force, who was qualified to testify as an expert in the area of sales and distribution of controlled substances in the southwest Michigan area. In his expert opinion, the amount of marijuana in defendant's possession indicated distribution of the drug, because the quantity was excessive for mere personal use. He expressed the same opinion regarding the amount of cocaine found in defendant's possession. In addition, he testified that the presence of scales and packaging materials in the car indicated an intent to sell the drugs. The keys to the safety-deposit box containing about $16,000 cash were found in the trunk of the car defendant was driving. This was money which Quesada placed in the safety-deposit box the day before he rented a car and loaned it to defendant. Defendant's specific intent to deliver the marijuana and cocaine found in the car he was driving could be reasonably inferred from the facts of this case.

Next, sufficient evidence was presented to convince a reasonable jury that Quesada possessed the requisite specific intent. First, as mentioned above, the amount of drugs found in the car indicated an intent to sell the drugs. Second, it could be reasonably inferred that Quesada helped package the drugs in the trash bags and place them in the car's trunk, as his fingerprints were found on the plastic baggies containing both marijuana and cocaine. Quesada's actions before defendant's arrest, including his

placing the cash in the safety-deposit box, renting the car for defendant's use, and placing the safety-deposit box keys in the car's trunk, all indicate that Quesada planned for the drugs to be transported to the Port Huron area for distribution.

Finally, sufficient evidence was presented to convince a reasonable jury that defendant and Quesada possessed the specific intent to combine with each other to deliver the drugs to Port Huron for profit. Defendant was found driving a car which Quesada had rented the previous day. He admitted that Quesada was his friend, and that Quesada had loaned him the car for the purpose of driving to the Port Huron area. The two keys to the safety-deposit box were found in the trunk of that car, and the jury could have inferred that this was done to provide defendant with security that he would be paid for delivery of the drugs. Although defendant denied any knowledge that drugs were present in the car, the state police troopers testified that the smell of fresh marijuana was evident when they stopped defendant on the highway. In addition to that smell, a beam-scale and rolling papers were contained in the car's passenger compartment, along with an opened plastic baggie filled with cocaine. Defendant's statement while in the back seat of the police car also supported the inference that he knew drugs were in the car. Defendant's 198 calls or attempted telephone calls to Quesada's telephone number in Port Huron also support the inference that the two had combined in an agreement regarding the drugs found in the car. The timing of the first call which defendant made from the jail's booking area, when combined with Quesada's return flight to Port Huron and attempt to reclaim the money in the safety-deposit box, showed that the men were working in concert.

Sufficient evidence having been presented on the two conspiracy counts, defendant's convictions on these offenses are affirmed.

II.

Defendant next requests a remand to the circuit court for clarification and correction of his sentences. We agree that a remand for clarification and correction of the sentences is warranted.

We begin with defendant's convictions on the underlying drug offenses. Defendant was convicted on count two, possession with intent to deliver between 5 and 45 kilograms of marijuana, which carries a maximum penalty of seven years' imprisonment. MCL 333.7401(2)(d)(ii); MSA 14.15(7401)(2)(d)(ii). Defendant was also convicted on count four, possession with intent to deliver between 50 and 225 grams of cocaine, which carries a minimum penalty of ten years' imprisonment and a maximum penalty of twenty years' imprisonment. MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). However, the court found defendant to be a fourth habitual offender and, based on that status, imposed an enhanced sentence of 6 to 20 years on the marijuana charge and an enhanced sentence of 12 to 60 years on the cocaine charge.

The fourth habitual offender statute, MCL 769.12; MSA 28.1084, does not prevent a trial court from imposing an enhanced sentence upon a defendant who has committed a controlled substances offense and whose prior offenses involve only non-drug related crimes. *People v Primer*, 444 Mich 269, 274-275; 506 NW2d 839 (1993); *Fetterley, supra* at 511. The circuit court could have enhanced defendant's sentence up to "imprisonment for life or for a lesser term" on these two

counts. MCL 769.12(a); MSA 28.1084(a). It permissibly enhanced defendant's sentences on count two to a term of 6 to 20 years, and on count four to a term of 12 to 60 years.

Next, we turn to defendant's convictions on the conspiracy charges. Defendant was convicted on count one, conspiracy to possess with intent to deliver marijuana, and sentenced to a term of 6 to 20 years. He was also convicted on count three, conspiracy to possess with intent to deliver cocaine, and sentenced to a term of 12 to 60 years. The conspiracy statute, MCL 750.157a(a); MSA 28.354(1)(a), provides that the defendant "shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit." Because the circuit court imposed the same sentences on the conspiracy charges which it imposed for the underlying drug possession charges, those sentences were proper.

Next, we consider defendant's conviction on the concealed weapon charge. Defendant was convicted on count five, carrying a concealed weapon, which carries a maximum penalty of five years' imprisonment. MCL 750.227(3); MSA 28.424(3). However, the trial court imposed a sentence of 3 to 15 years on this charge. Although not explicitly stated, this sentence was enhanced under the habitual offender statute, as it exceeds the ordinary maximum penalty for the crime. The term of years imposed by the circuit court on this offense was proper based on defendant's fourth habitual offender status. MCL 769.12(a); MSA 1084(a).

The court appropriately determined that defendant's sentences for possession with intent to deliver cocaine and conspiracy to commit that offense are to run consecutively to each other and consecutively to the other offenses, MCL 333.7401(3); MSA 14.15(7401)(3); *People v Denio*, 454 Mich 691, 695, 712; 564 NW2d 13 (1997), and that the sentences for possession with intent to deliver marijuana, conspiracy to commit that offense, and carrying a concealed weapon are to run concurrent with each other. *People v Chambers*, 430 Mich 217, 222; 421 NW2d 903 (1988).

At the sentencing hearing, the trial court did not state a specific sentence to be imposed under the habitual offender statute. Rather, as previously noted, it properly enhanced each of the sentences on the individual underlying charges based on defendant's status as a fourth habitual offender. Subsequently, on both the original and amended judgments of sentence, the trial court correctly listed defendant's underlying convictions and sentences, as enhanced, for counts one through five and then listed defendant's fourth habitual offender conviction as count six, for which the court inexplicably recorded a sentence of 12 to 60 years "concurrent." The court did not state with which of the other sentences the habitual offender sentence is to be concurrent.

The court cannot impose concurrent sentences for an underlying felony and the habitual offender charge. *People v Hambrick*, 169 Mich App 554 556-557; 426 NW2d 702 (1988). Because at sentencing the court took into consideration defendant's habitual offender status when it imposed the sentences on defendant's underlying convictions, the court could not then also impose a separate sentence on defendant as an habitual offender. *Id.* Moreover, because the court must impose sentences for possession with intent to deliver cocaine and conspiracy to commit that offense which are consecutive to each other and consecutive to the other, concurrent sentences, the court cannot sentence

defendant solely under the habitual offender statute. MCL 333.7401(3); MSA 14.15(7401)(3); *Denio, supra.* See also *Primer, supra.*

We remand this case to the trial court for clarification and correction of the judgment of sentence. If it were the trial court's intent that defendant be sentenced in accordance with the sentence articulated by the court at the sentencing hearing, the trial court should issue a corrected judgment of sentence to reflect that defendant is sentenced on counts one through five (to the terms as previously specified on the judgments of sentence) as a fourth habitual offender, and the corrected judgment of sentence should include defendant's conviction as a fourth habitual offender, MCL 769.12; MSA 28.1084, under count six with no sentence being imposed on that count. The corrected judgment of sentence should also reflect that counts three and four are consecutive to each other and consecutive to counts one, two and five, which are concurrent with each other, and should reflect the appropriate jail credit as of the date the judgment is corrected. If the court's intent were otherwise, the court is to hold a resentencing hearing at which the court will specify the sentences to be imposed with the judgment of sentence being corrected to reflect same. The trial court must forward a copy of the corrected judgment of sentence to the Department of Corrections.

We affirm defendant's convictions and remand for clarification and correction of the judgment as sentence as specified herein. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey